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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 176

GULF, MOBILE & OHIO RAILROAD COMPANY,
A CORPORATION,

Petitioners,

vs.

JAMES B. MAXIE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 176

GULF, MOBILE & OHIO RAILROAD COMPANY,
A CORPORATION,

Petitioners,

vs.

JAMES B. MAXIE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Gulf, Mobile and Ohio Railroad Company, a corporation, respectfully petitions for a Writ of Certiorari to review the final judgment and decision of the Supreme Court of Missouri, the highest Court of that State, affirming a judgment for Sixteen Thousand Dollars ($16,000.00) in favor of James B. Maxie and against your petitioners, in an action brought under the Federal Employers' Liability Act as amended by the Act of August 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, 45 U. S. C. A. Sec. 51.

Opinions Below

The opinion of the Supreme Court of Missouri is reported in *Maxie* v. *Gulf Mobile & Ohio Railroad*, 219 S. W. 2 322 (not yet officially reported). Copy of opinion (R. 165 *et seq.*). The opinion of the Supreme Court of Missouri on the first appeal is reported in 356 Mo. 633, 202 S. W. 2 904.

Jurisdiction

This action arose and was determined under the Federal Employers' Liability Act as amended by Act of August 11, 1939 (45 U. S. C. A. Sec. 51), for damages for personal injuries to Maxie while working as a carpenter in petitioner's general repair shop at Mobile, Alabama. The Missouri Supreme Court held that Maxie had a right of action under the Federal Employer's Liability Act by virtue of the 1939 Amendment thereto, and that he was entitled to invoke the *res ipsa loquitur* doctrine by reason of the circumstances shown by the evidence. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257 (3). The judgment of the Supreme Court of Missouri, the highest Court in the State of Missouri, was entered on the 14th day of March, 1949 (R. 164), and petitioner's motion for rehearing and to transfer from division to the Court en banc was denied by that Court on the 11th day of April, 1949 (R. 178), making the judgment final. Case believed to sustain jurisdiction is:

Wilkerson v. *McCarthy*, 1948, — U. S. —, 93 L. Ed. (adv.) 16.

Statute Involved

The pertinent provisions of the Federal Employers' Liability Act (45 U. S. C. A. Sec. 51 *et seq.*) are set forth in the appendix.

Questions Presented

Respondent brought suit under the Federal Employers' Liability Act "as amended by Act of August 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, 45 U. S. C. A. Sec. 51," alleging that part of his duties as a car repairer in petitioner's shop "was the furtherance of interstate commerce • • • and directly, closely, and substantially affected such commerce" (R. 3).

Petitioner denied that a part of respondent's duties were in furtherance of or directly, closely or substantially affected interstate commerce; and denied that the Federal Employers' Liability Act applied (R. 6, 7).

The evidence showed and the Supreme Court of Missouri found that respondent was regularly employed to work on freight cars that were withdrawn from service and brought to petitioner's shop to be repaired and rebuilt on tracks specifically designated for work on cars of such character, and that respondent's duties did not require him to work on any other cars nor to perform any other service.

We have for decision by this Court for the first time since the Act of August 11, 1939, c. 685, 53 Stat. 1404, the following Federal questions:

Questions

1. When railroad cars have been withdrawn from interstate commerce for general repairs and are neither fit for use in commerce nor designated for such use during repairs, is it within the intendment of the Federal Em-

ployers Liability Act that work devoted exclusively to the repair and rebuilding of such cars shall be considered the furtherance of interstate commerce or that such work directly or closely and substantially affects interstate commerce?

OR

Is an employee engaged in such work performing duties in furtherance of, or in any way directly or closely and substantially affecting interstate commerce?

2. In a case where an injured employee seeks to invoke the Federal Employers Liability Act, and where the defendant employer denies that the Act applies and introduces evidence to prove that the employee worked only in repairing and rebuilding cars that had been withdrawn from service, does defendant's denial and supporting evidence require that the question of whether or not the Act applies be submitted to the jury?

OR

Can the trial court, in such circumstances, instruct the jury that as a matter of law the plaintiff employee was at the time of injury engaged in interstate commerce or in the performance of duties in furtherance of interstate commerce?

3. Does Congress, by virtue of the commerce clause of the Constitution of the United States of America (Article I, Section 8, Clause 3), have the power to regulate master-servant relationships in repair shops of railroads engaged in interstate commerce, when the work performed in such shops is confined to work upon railroad cars and other instrumentalities of commerce which have been completely withdrawn from transportation service pending repairs

and which have no re-assignment in commerce until such time as repairs are completed?

OR

Would an Act of Congress regulating such a relationship be repugnant to the Constitution?

Statement

Respondent brought this action in a Missouri State Court under the provisions of the Federal Employers' Liability Act (45 U. S. C. A. Sec. 51 *et seq.*) for injuries sustained when some heavy box-car doors fell upon and struck him, allegedly "as the result of negligence on the part of defendant" (Petitioner), (R. 3).

By its answer to respondent's petition, and on appeal to the Supreme Court of Missouri, petitioner denied that respondent was engaged in interstate transportation, denied that a part of respondent's duties was the furtherance of interstate transportation, or that any part of his duties directly, closely or substantially affected interstate commerce, and denied that respondent ever was subject to the Act at any time during his employment by petitioner (R. 7).

The case was tried before a Jury (R. 8).

The evidence showed and the Supreme Court of Missouri found the following facts:

> "Plaintiff (respondent) was employed by the railroad (petitioner) as a car repairer in its shops and yards at Mobile, Alabama. There, car repairs are separated into two general classes. Light and 'running' repairs to cars are both made on certain tracks assigned for that purpose. Repairs which require more than one day and up to three days are classified as light repairs, running repairs are those which can

be made the same day. These may be performed on loaded cars as well as on empty ones. Heavy repairs to cars are made on other tracks designated for that purpose. These include even rebuilding a car. Sometimes so-called heavy repairs can be done in three days at the minimum—generally more time is required. Cars on the heavy repair tracks usually remain there for a week. Plaintiff was assigned to work at heavy repairs. He was working on the repairs of a GM&O box car when he was injured. The railroad's records introduced by plaintiff described the work done on this car as 'heavy repairs and painted red.' The car came empty to the yards at Mobile from an interstate trip, remained on the heavy repair tracks there for a week, and then went out from the yards for loading and movement in interstate commerce." (R. 166).

Petitioner's evidence showed that all cars brought to the heavy repair track, where respondent worked, were "stripped down" and were not in condition while undergoing repair to be used in any kind of service. (R. 93, 106, 110-111, 114), and respondent testified that cars brought into the heavy repair tracks "weren't in condition to be moved out? • • • A. Not until they were repaired" (R. 134).

The trial court overruled petitioner's motion to direct a verdict in its favor (R. 139-140), and, over petitioners' objection gave instruction No. 1 which was as follows:

> "The Court has decided, as a matter of law, that at the time of plaintiff's injury he was engaged in interstate commerce or was engaged in the performance of duties in furtherance of interstate commerce. Therefore, you need not concern yourselves with that question." (R. 141).

The trial of the case resulted in a verdict and judgment for respondent for Thirty-two thousand dollars ($32,000),

which was reduced to Sixteen thousand dollars ($16,000) by remittitur (R. 158).

Upon petitioner's appeal, Division One of the Missouri Supreme Court affirmed the judgment (R. 164), and later overruled petitioner's Motion for rehearing or to transfer the case to the Missouri Supreme Court en banc (R. 178).

Basis of Opinion of the State Court

In passing upon the case, and as a basis for its decision that the case was governed by the provisions of the Federal Employers' Liability Act, the Supreme Court of Missouri made reference to its opinion on the first appeal, *Maxie* v. *Gulf, Mobile and Ohio Railroad Company*, 356 Mo. 633, 202 S. W. 2, 904, and aptly pointed out that in the present case petitioner "says our decision on the first appeal plainly misinterpreted and misapplied the 1939 Amendment of the Federal Employers' Liability Act. 45 U.S.C.A., § 51 *et seq.*

> "On the latter contention the railroad argues we held the 1939 Amendment has the effect of putting the box car into interstate commerce at the time plaintiff was repairing it when in fact it was withdrawn from such commerce while under heavy repair. The railroad draws that conclusion because we held that plaintiff who was engaged in performing heavy repairs on the box car was included under the Act as amended". (R. 167.)

The Court then said it "did not hold that the box car was being used in interstate commerce while it was in the yards under repairs," and continued with the statement that "such a finding is no longer necessary to the application of the act." (R. 168).

The Court held that respondent's duties were in furtherance of or closely affected interstate commerce, because he "was regularly employed in repairing and rebuilding

freight cars which came into the yards from interstate use and, after repair, went out of the yards into interstate use. So we ruled plaintiff's duties brought him under the act as extended by the Amendment because they were in furtherance of and closely affected interstate commerce.

"Since the undisputed facts on this appeal are the same as on that (first) one, we reach the same conclusion, and again rule plaintiff's duties brought him under the act as amended" (R. 168).

The Court affirmed the judgment against petitioners (R. 164), and overruled petitioner's motion to grant a rehearing or transfer the cause to Supreme Court of Missouri, en Banc (R. 178).

The above resume of the opinion of the Missouri Court shows that it is of the opinion that the mere showing that respondent was employed to work on freight cars that had been moved in interstate commerce, and that were returned to such commerce after respondent's work on them was completed and done, was sufficient to bring the Federal Employers' Liability Act into operation. The effect of the opinion is to find that no car on which plaintiff worked was, at the time, an instrumentality of interstate transportation, but that the Act applies because such cars once had been instrumentalities of interstate transportation, and, after being repaired, again became instrumentalities of interstate transportation.

Reasons for Granting the Writ

I

Since the Amendment of August 11, 1939, c. 685, § 1, 53 Stat. 1404, to the Federal Employers' Liability Act, 45 U. S. C. A. 51, *et seq.*, this Court has not had for decision an action for damages under the Act for injury to an

employee whose exclusive duties consisted of repairing and rebuilding railroad cars that had been withdrawn from interstate commerce for "heavy" or major repairs and that were not usable as instrumentalities of commerce while undergoing repair. Therefore, this Court has not directly passed upon the important question of whether the 1939 Amendment extends the provisions of the Act to such an employee. The opinion of the Missouri Court recognized that "The facts are not disputed" (R. 166); that "Heavy repairs are made on (other) tracks designated for that purpose;" that "heavy repairs can be done in three days at the minimum;" and that "plaintiff (respondent) was assigned to work at heavy repairs" (R. 166). That court also recognized "the undisputed fact" that the cars on which respondent worked were not being "used in interstate commerce" while under repair (R. 168), but held that a finding that the "car itself was being used in interstate commerce while it was in the yards under repair • • • is no longer necessary to the application of the Act" (R. 168). Then the Court found that because the cars on which respondent worked "came into the yards from interstate use and, after repair, went out of the yards into interstate use" respondent's duties "brought him under the act as extended by the amendment because they were in furtherance of and closely affected interstate commerce." (R. 168).

The Missouri Court refused to hold that before work on a car can be considered as the furtherance of interstate commerce, the car itself must at the time be an instrumentality of commerce.

This petition therefore raises substantial and important questions regarding the scope and extent of the Federal Employers' Liability Act, and especially whether the 1939 Amendment had the effect of extending the provisions of

the Act to an employee who was not engaged in interstate commerce and whose duties, before the Amendment, would not have been held to be the furtherance of interstate commerce, or to directly or closely and substantially affect such commerce.

The determination by the Missouri Court is unquestionably contrary to the manner in which this Court would have decided the case.

II

The determination by the Missouri Court that work on a freight car that has been withdrawn from service for general repairs is "in furtherance of" interstate commerce and that interstate commerce is "closely affected" thereby is in direct conflict with controlling decisions by this Court holding that equipment withdrawn from interstate commerce for repair does not give an interstate character to the work of repairing it. *Industrial Accident Commission of California* v. *Davis*, 259 U. S. 182, 66 L. Ed. 888; *Minneapolis & St. Louis Railroad Co.*, v. *Winters*, 242 U. S. 353, 61 L. Ed. 358; *Shanks* v. *Delaware, Lackawanna & Western Railroad Co.*, 239 U. S. 556, 60 L. Ed. 436.

III

In holding in the case of a car repairer that a finding that the cars which he repaired are being used in interstate commerce is not necessary to the application of the Federal Employers' Liability Act, the opinion of the Supreme Court of Missouri is in conflict with decisions of this Court and other Federal Courts.

Minneapolis & St. Louis Railroad Company v. *Winters*, 242 U. S. 353, 37 S. Ct. 170, 61 L. Ed. 358;

Industrial Accident Commission of the State of California v. *Davis*, 259 U. S. 182, 66 L. Ed. 888;

Sullivan v. *New York, N. H. & H. R. Co.* (C.C.A. 2), 74 Fed. (2d) 725.

IV

The opinion of the Supreme Court of Missouri holds that where a railroad car is removed from interstate commerce and taken to the general repair track to undergo general repairs, or even to be rebuilt, an employee who is injured while working on such car can invoke the provisions of the Federal Employers' Liability Act, because the car moved in interstate transportation on its way to the general repair track and re-entered interstate use after repairs on it were completed.

(a) Such holding is in conflict with controlling decisions of this Court and other Federal Courts.

Minneapolis & St. Louis Railroad Co. v. *Winters,* 242 U. S. 353, 37 S. Ct. 170, 61 L. Ed. 358;

Sullivan v. *New York, N. H. & H. R. Co.,* (C.C.A. 2), 74 Fed. (2d) 725;

New York, N. H. & H. R. Co. v. *Bezue,* 284 U. S. 415, 76 L. Ed. 370;

Rice v. *Baltimore & O. R. Co.,* (C.C.A. 6), 42F (2d) 387.

(b) Such holding is in conflict with decisions of the Supreme Court of Missouri.

Toussaint v. *Cleveland, C. C. & St. L. Ry. Co.,* 340 Mo. 578, 104 S. W. (2d) 263;

Oglesby v. *St. Louis-San Francisco Ry. Co.,* 318 Mo. 79, 1 S. W. (2d) 172.

(c) Such holding is in conflict with decisions of the Courts in other states.

Baird, et al. v. *New York Central R. Co., et al.,* (New York Supreme, App. Div.), 86 N. Y. S. (2d) 49;

Propst v. *Spitznagle, (Indiana Sup.)* 215 Ind. 402, 19 N. E. (2d) 263.

V

The interpretation of the 1939 Amendment to the Federal Employers' Liability Act which was adopted by the Supreme Court of Missouri rests upon a supposition that Congress has the power to regulate master-servant relationships between an interstate railroad and its employee when the duties of the employee are confined to repair work on cars completely withdrawn from interstate commerce pending repairs. Congress does not have that power, and such an interpretation renders the Act repugnant to the Constitution of the United States and is contrary to cases decided by this court.

Constitution of the United States, Tenth Amendment;
Howard v. *Illinois Central Railroad Company* and *Brooks* v. *Southern Pacific Company,* 207 U. S. 463, 52 L. Ed. 297;
Mondou v. *New York, N. H. & H. R. Co.,* 223 U. S. 1, 56 L. Ed. 327.

It is essential that this writ be granted in order to determine important questions involving the interpretation of the Federal Employers' Liability Act and particularly the Amendment of August 11, 1939, c. 685, §-1, 53 Stat. 1404, 45 U. S. C. A. § 51.

Prayer

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of this Court, directed to the Supreme Court of Missouri, commanding that Court to certify and send to this Court a transcript of the record in the case entitled, "James B. Maxie, respondent, v. Gulf, Mobile & Ohio Railroad Company, a corporation, appellant, Number 40768," including also the proceedings in the Missouri

Supreme Court, to the end that the cause may be reviewed and determined by this Court and the judgment of the lower court reversed.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Statement of Case

The facts with reference to the opinion of the Missouri Court, jurisdiction of the Court, and the statute involved have been sufficiently covered in the petition for certiorari and will not be here repeated. The issues, the pleadings, and the evidence have been stated, so that further reference to them will not be made at this point.

Specifications of Error to Be Urged

The Supreme Court of Missouri erred:

1. In holding that the Federal Employers' Liability Act applies in the case of a car repairer whose duties are confined to repairing and rebuilding railroad cars that are withdrawn from interstate commerce and are not instrumentalities of commerce while being repaired.

2. In holding that the 1939 Amendment to the Federal Employers' Liability Act extended the provisions of the Act so as to include an employee who was not employed in interstate commerce, and no part of whose duties would have been considered before the Amendment as the furtherance of interstate commerce or to directly or closely and substantially affect such commerce.

3. In holding that since the Amendment of August 11, 1939, to the Federal Employers' Liability Act, a finding that the duties of a carrier's employee require him to work on a railroad car or other instrumentality that is being used in interstate commerce is no longer necessary to the application of the Act.

4. In holding that a railroad car which has been withdrawn from interstate commerce can give an interstate character to the work of repairing it.

5. In allowing recovery under the Federal Employer's Liability Act in a case where the employee was not employed in interstate commerce, and where no part of the employee's duties were in furtherance of or in any way directly or closely and substantially affected interstate commerce.

6. In permitting judgment to stand when in order to do so it was necessary to extend the scope of the Federal Employers' Liability Act beyond the constitutional limits of the power of Congress to regulate interstate commerce.

ARGUMENT

I

All of the Cars upon Which Respondent Worked Had Been Removed from Interstate Commerce; Therefore No Part of Respondent's Duties Were in Furtherance of or in Any Way Directly or Closely and Substantially Affected Interstate Commerce.

The respondent, James Bodie Maxie, filed his petition in the Circuit Court of the City of St. Louis, Missouri, alleging therein that the petitioner, Gulf, Mobile and Ohio Railroad was an interstate carrier and further alleging that a part of respondent's duties as an employee of petitioner "was the furtherance of interstate commerce, to-wit, the interstate transportation business of defendant, and directly, closely and substantially affected such commerce, and, that, therefore, plaintiff and the defendant were then and there subject to * * *" the Employers' Liability Act as amended

on August 11, 1939, C. 685, Sec. 1, 53 Stat. 1404, 45 U. S. C. A. Sec. 51 (R. 3).

Petitioner, admitted that it was an interstate carrier but denied that a part of respondent's duties as petitioner's employee was the furtherance of interstate commerce, or the interstate transportation business of petitioner, or directly, closely or substantially affected interstate commerce, and denied that respondent and petitioner were subject to the Employers' Liability Act at the time of the occurrence complained of in respondent's petition.

After a trial on the issues, the Missouri trial court instructed the jury that as a matter of law the Act did apply to the case (R. 141), and the case was thereupon submitted to the jury with a resultant verdict for the respondent, assessing money damages against defendant for personal injuries sustained, and judgment was entered.

Subsequently, petitioner appealed to the Supreme Court of Missouri, and respondent's judgment was affirmed. It is that affirming opinion which gives rise to this petition for certiorari.

This same case had previously been before the Missouri Supreme Court on appeal by petitioner, and respondent's judgment was then reversed and remanded upon a point of law not under consideration here. *Maxie* v. *Gulf, Mobile & Ohio Railroad Co.*, 356 Mo. 633, 202 S. W. 2 904. However, upon the first trial of the case the trial court had ruled in a like manner as to the application of the Act, and the Missouri Supreme Court affirmed the giving of an instruction identical to the one given upon this second trial. In the opinion under consideration the Missouri Supreme Court adopted and affirmed its original ruling with added explanations for its findings of law.

In the opinion the court held that the facts, bearing upon the application of the Act, were undisputed and outlined them as follows:

> "Plaintiff was employed by the railroad as a car repairer in its shops and yards at Mobile, Alabama. There, car repairs are separated into two general classes. Light and 'running' repairs to cars are both made on certain tracks assigned for that purpose. Repairs which require more than one day and up to three days are classified as light repairs. Running repairs were those which can be done the same day. These may be performed on loaded cars as well as on empty ones. Heavy repairs to cars are made on other tracks designated for that purpose. These include even rebuilding a car. Sometimes so-called heavy repairs can be done in three days at the minimum—generally more time is required. Cars on the heavy repair tracks usually remain there for a week. Plaintiff was assigned to work at heavy repairs. He was working on the repairs of a GM&O box car when he was injured. The railroad's records introduced by plaintiff described the work done on this car as 'heavy repairs and painted red'. The car came empty to the yards at Mobile from an interstate trip, remained on the heavy repair tracks there for a week, and then went out from the yards for loading and movement in interstate commerce." (R. 166)

From the above statement of the controlling facts, the Missouri Supreme Court held that the disputed instruction was properly given by the trial court. Petitioner firmly believes that the instruction does not follow the applicable law and that the Supreme Court of Missouri erred in its ruling. Petitioner on its appeal relied upon those cases decided by this Court upon facts arising before 1939, which cases held that work done on general repair tracks maintained by interstate railroads did not

come under the purview of the Federal Employers' Liability Act, and petitioner asserted that the 1939 amendment to the Act did not supersede the law of those cases. In dealing with that view of the law, the Supreme Court of Missouri recognized that before the 1939 amendment the work done by respondent would not have been considered as being within the Act (R. 167-8), but the court held that the amendment expanded the field covered by the Act so that the work of respondent was included. The court recited that the Act as amended now covers:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (R. 168.) *Federal Employers' Liability Act,* C. 685, Sec. 1, 53 Stat. 1404, 45 U. S. C. A. Sec. 51 *et seq.*

The Missouri Court reasoned that since the cars on which respondent worked came into the yards from interstate use, and after repairs went out of the yards into interstate use, that therefore respondent's work upon the repairs of those cars was in furtherance of and closely affected interstate commerce, and the 1939 Amendment therefore made the Act applicable to the case. This is the meat of the controversy. The Missouri Court has based its decision upon events transpiring before and after the period of removal to the general repair tracks but has not concerned itself with the period of removal itself. The court has not considered the commercial character of the cars during the time that they were undergoing repairs; yet respondent's work was admittedly confined to repair work, and his duties did not lead him into work which was done on

those cars when they were moving in interstate transportation either before or after repairs.

It is petitioner's contention that those cars upon which respondent worked did not have an interstate character during the time that they were on the heavy repair tracks, and that it must necessarily follow that respondent's duties, being confined to repair work on cars which were not instrumentalities of interstate transportation or commerce, were not in furtherance of and did not closely and substantially affect interstate commerce—as the opinion of the Missouri Court has held. The Court itself accepted petitioner's claim that the cars were not instrumentalities of interstate commerce, in the following language—referring to its first published opinion in the case:

> "We did not hold the box car itself was being used in interstate commerce while it was in the yards under repair. Such a finding is no longer necessary to the application of the Act." (R. 168).

While the above language is not so definite as to say that the cars were not instrumentalities of interstate transportation, the meaning of the sentence is clear, and we propose to demonstrate that under the law the cars had no commercial character whatsoever while they were undergoing repairs.

Before the 1939 Amendment those cases involving facts similar in legal import to the facts of the case at bar were often decided upon technicalities, and fine lines of distinction were drawn; however the law resolved itself to a point where under a given set of facts, the courts could determine whether or not a particular car was an instrument of interstate commerce at the moment of injury to an employee engaged in work upon that particular car. Petitioner recognizes that the "moment of injury test" was done away with by the 1939 Amendment; however, that statutory

change did not wipe out all of the law which was declared by the above mentioned class of cases. Those cases are still good law in the determination of whether or not a particular car was an instrumentality of interstate commerce during a given period of time. The period of time which concerns us here begins with the time when cars were brought onto the tracks where plaintiff worked and ends at that time when the cars were given assignments and were returned to use in commercial transportation. Under the authority of those cases decided on facts arising before the Amendment, the facts recited by the Missouri Supreme Court can lead only to a conclusion that all of the cars upon which the respondent worked had been removed to the repair tracks, "a definite withdrawal from service and placement in new relations—the relations of a workshop."

The above quotation was taken from the case of *Industrial Accident Commission of the State of California* v. *James C. Davis,* 259 U. S. 182, 66 L. Ed. 888, decided by this court in 1922.

In that case an engine was taken from use in interstate commerce and sent to a shop for repairs. The plaintiff was an employee in the repair shop and while working on that engine he was struck in the eye by a piece of steel. He applied for compensation under the state law, and the defense was made that he was engaged in interstate commerce when injured. The evidence showed that the engine was sent to the shop December 1, 1918, for general overhauling, during which operation it was to a certain extent dismantled and stripped. The work was completed approximately three months later. The Commission made an award in the plaintiff's favor, but was reversed by the California Court of Appeals. Upon a Writ of Certiorari to this Court, the Court of Appeals was reversed, this

Court finding, as a matter of law, that the plaintiff was not in interstate commerce within the meaning of the Act. The Court reasoned as follows:

> "The Federal Act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement —indeed, are necessary to it; but so are all attached to the railroad company—official, clerical, or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees, and the test declared, that the employee, at the time of the injury, must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it, in order to displace state jurisdiction and make applicable the Federal Act. And there is a difference in the instrumentalities. In some, the tracks, bridges, and roadbed and equipment in actual use, may be said to have definite character, and give it to those employed upon them. But equipment out of use, withdrawn for repairs, may or may not partake of that character, according to circumstances; and among the circumstances is the time taken for repairs—the duration of the withdrawal from use. Illustrations readily occur. There may be only a placement upon a sidetrack or in a roundhouse—the interruption of actual use and the return to it, being of varying lengths of time; or there may be a removal to the repair and construction shops, a definite withdrawal from service and placement in new relations—the relations of a workshop—its employments and employees having cause in the movements that constitute commerce, but not being immediate to it.

"And it is this separation that gives character to the employment, as we have said, as being in or not in commerce. Such, we think, was the situation of the engine in the present case. It was placed in the shop for general repairs on December 19, 1918. On February 25, 1919, after work upon it, it was given a trial, and it was placed in service on March 4, 1919. The accident occurred on February 1st of that year, the engine at the time being nearly stripped and dismantled. 'It was not interrupted in an interstate haul to be repaired and go on.' *Minneapolis & St. L. R. Co.* v. *Winters*, 242 U. S. 353, 356, 61 L. Ed. 358, 359, 37 Sup. Ct. Rep. 170, Ann. Cas. 1918 B, 54, 13 N.C.C.A. 1127; *Chicago, K. & S. R. Co.* v. *Kindlesparker*, 246 U. S. 657, 62 L. Ed. 925, 38 Sup. Ct. Rep. 425."

Industrial Accident Commission v. *Davis*, supra, L. C. 259 U. S. 187, 188; 66 L. Ed. 892.

The Court there took its cue from the *Winters* case, in which the Court said:

"An engine, as such is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in any interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

Minneapolis & St. Louis Railroad Co. v. *Winters*, 242 U. S. 353, 37 S. Ct. 170, 61 L. Ed. 358, 359, Ann. Cas. 1918 B 54.

This court recognized that all employees of most railroads were engaged in some work affecting interstate

commerce. However, the Court, in interpreting the Employers' Liability Act, realized and held that the Act was not intended to and did not include all employees, but only those engaged in transportation of interstate commerce.

> "Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the Act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see Swift & Co. *v.* United States, 196 U. S. 375, 398, 49 L. Ed. 518, 525, 25 Sup. Ct. Rep. 276), and that the true test of employment in such commerce in the sense intended is, was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"
>
> *Shanks* v. *Delaware, Lackawanna & Western Railroad Co.*, 239 U. S. 556, 558; 60 L. Ed. 436, 438.

In commenting upon the use of the word "Transportation," this Court said:

> "It will be observed that the word used in defining the test is 'transportation,' not the word 'commerce.' The two words were not regarded as interchangeable, but as conveying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrow signification was chosen understandingly and deliberately as the appropriate term."
>
> *Chicago & Northwestern Ry. Co.* v. *Bolle*, 284 U. S. 74, 78; 76 L. Ed. 153, 176.

II

Congress Intended to Do Away With the "Moment of Injury" Test But Did Not Intend to Alter Those Elements Which Constitute "Interstate Commerce."

It was not the intention of Congress that the 1939 Amendment should change the law as declared by the cases cited under Point I. The Amendment was passed in order to do away with the perplexing "moment of injury" test and to provide uniform treatment for those employees whose duties caused them to shift from work in furtherance of interstate commerce to work which was not covered by the Act. The Amendment was proposed through the Senate Committee on the Judiciary. That committee, which drafted the language of the Amendment, issued the following short but revealing report telling why the Amendment was needed and what effect it was intended to have on the law as it then existed:

> "This Amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.
>
> "The question whether an employee, at the time of his injury, is engaged in interstate or intrastate commerce is frequently difficult of determination. Under the rule laid down by the Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged, at the time of the infliction of the injury, 'in transportation or work so closely related to it as to be practically a part of it.' (Shank *v.* D., L. & W. R. R., 239 U. S. 556).
>
> "In order to prove interstate transportation, if the question is at all obscure, it is necessary to procure

the records of the carrier to show that the train, or the car upon which the employee was working, at the time of the injury, contained some commodity, which was being transported in interstate commerce, or, if the car be empty, it is necessary to prove by the records of the company that the car was then en route in an interstate movement.

"As a result of the uncertainty which exists in borderline cases, there have been many instances in which suits were commenced and prosecuted to final determination only to develop the fact that the claimant had chosen the wrong remedy, or sued in the wrong court, and during the acquirement of this information the statute of limitations ran against the claimant under the law applicable to the case and no recovery could be had.

"Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce. In railroad switching service particularly men may be engaged in interstate and intrastate commerce intermittently several times during a single tour of duty.

"The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the Act.

"The preponderance of service performed by railroad *transportation* employees is in interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed." (Emphasis ours.)

Senate Reports, 76th Congress 1st Sess., Rep. No. 661.

The language of the committee report clearly demonstrates that the Amendment was intended solely for the purpose of doing away with the "moment of injury" test, which was expounded in the Shanks case—cited in the report. It lends no aid to the theory advanced by the Supreme Court of Missouri to the effect that a unit of work which previously was not covered by the Act is now included within the Act's provisions. In its First opinion, the Missouri Court held:

> "We may concede that (prior to the 1939 Amendment) the freight cars receiving heavy repairs on the repair track 'were dead in the yards' (not in use in interstate transportation) during the course of such repairs."
>
> *Maxie* v. *GM & O*, 202 S. W. (2d) 904, 907; 356 Mo. 633, 640.

Certainly the amendment was not designed to and does not now affect the elements which when gathered together constitute interstate commerce. If the cars on which respondent worked would have been considered as not in use in interstate commerce before 1939, then surely they were not in use in interstate commerce when plaintiff was working on them in 1943. If Congress had intended to change the makeup of interstate commerce, as a legal conception, it would have so expressed itself, in clear terms.

III

The Cases Construing the 1939 Amendment Are in Definite Conflict and This Court Has Not Passed upon the Questions Here Presented.

Your petitioner does not assert that the Missouri Court is in discord with all other decisions, but instead petitioner recognizes that the question here presented has been decided both ways, resulting in a conflict of decisions which can be resolved only by this Court. The conflict has been noted by the Supreme Court, Appellate Division, of the

State of New York in the case of *Baird et al* v. *New York Central R. Co. et al.*, 86 N. Y. S. 2 49. The case considers the claims of three employees, which claims are based upon facts very nearly identical with those of the case at bar. Baird was a blacksmith, the other two were machinists. The work of all three was confined to locomotives that had been withdrawn from immediate service, were disabled, without power, and would not be reassigned until after repairs were completed. These men had no contact with any equipment which was in immediate use in any commerce. Most of the locomotives brought into the shop came out of and were eventually returned to interstate commerce. The three employees were granted awards by the state Workmen's Compensation Board, and the New York Supreme Court, Appellate Division, upheld the awards, stating that the 1939 Amendment was not designed nor intended to include employees such as these. The court quoted from the report of the Senate Judiciary Committee and then went on to say:

> "It seems clear from the foregoing that the Congress, in adopting the amendment, never intended thereby to include employees such as these claimants, whose employment at no time was of interstate character, simply because they were employed in a shop where interstate equipment was from time to time laid up for repairs. It must be borne in mind that even under the amendment the duties of the employee must still be in furtherance of interstate commerce. 'Commerce' in this sense has long been interpreted as meaning 'transportation' and the test has been whether the employee's work was directly related to the interstate movement of persons and things in commerce. Chicago & Northwestern Ry. Co. *v.* Bolle, 284 U. S. 74, 52 S. Ct. 59, 76 L. Ed. 173. Work in repair shops on 'dead' engines or other equipment withdrawn from service has never been considered as coming within this definition and test. McGowan *v.* New York Central R. R. Co. 290 Y. Y. 889, 50 N. E. 2d 295. Although the amendment of 1939 did away with the requirements of the earlier cases that the employee must be engaged

in interstate commerce at the very moment of injury, it did not eliminate the necessity that his duties at some time or other must be in furtherance of such commerce. If the machinist at his bench and the blacksmith at his forge are to be included, we are in effect, holding that every employee of any carrier engaged in interstate commerce comes within the provisions of the amendment and are disregarding entirely the requirement that some part of his duties shall be in furtherance of or shall directly or closely and substantially affect such commerce. The effect of any such interpretation is of course obvious. We are depriving these three claimants and many more residents of this State of the benefits of the Workmen's Compensation Law solely because, through necessity or choice, they happen to work for an employer engaged in interstate commerce, and we are doing it in the face of the Tenth Amendment to the Federal Constitution, wherein it is written, 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' "

Baird et al v. *New York Central Railroad Co. et al*, 86 N. Y. S. (2d) 49.

The effect of the decision in this case was to uphold the employees' right to compensation under the state law. For argument we assume that the facts surrounding the employees' injuries did not include negligence of the Railroad employer and that therefore without workmen's compensation the employees would have had no remedy at law. If this present petition is denied, many employees will in the future be denied any remedy at law; while if it is granted and this Court shall reverse the Missouri Court, all railroad employees suffering injuries in these "back shops" will have the remedy afforded them by the Workmen's Compensation Acts of the various states of the union.

The decision of the New York Supreme Court, Appellate Division, in the *Baird* case was appealed to the New York Court of Appeals, and that court in a very recent decision entered May 26, 1949, has reversed the Appellate Division and has held that the 1939 Amendment made the Act applicable to the claimant-employees and that the Workmen's Compensation Commission had no power to make awards to those men (*In the Matter of the Claims of Fred Baird et al, Respondents* vs. *New York Central Railroad Company, appellant, Workmen's Compensation Board, Respondent*, — N. Y. —, —, N. E. ——). The New York Court of Appeals there reasoned that Congress intended to change both the "pin point" rule (moment of injury test) and the "Back shop" rule (as declared by the *Davis* and *Winters* cases, supra). The Court held that there could be no doubt that the "pin-point" rule was completely and clearly abolished and that the report of the Senate Judiciary Committee clearly demonstrated that Congress so intended; however the court went further and stated that a reading of the report discloses "no equally plain indication as to whether other border-line cases, such as those of 'backshop employees' were being considered and dealt with," and the court found that "as a practical matter we are left with nothing but the language of the amendment itself." In concluding that the "back-shop" rule was changed, the New York Court of Appeals cited the decision of the Supreme Court of Missouri in *Maxie* v. *Gulf, etc.*, 356 Mo. 633, which is the case at bar, and other cases as demonstrating the trend of decisions, but the court failed to consider the arguments advanced by the Appellate Division of the Supreme Court of its state and disregarded the mention made in the lower court of the Tenth Amendment to the Federal Constitution (which is dealt with under Point IV of this argument.)

The court did, however, state that "the exact question • • • has not been answered in any controlling case," and for that reason alone, in view of the important federal questions involved this petition should be granted.

IV

The Supreme Court of Missouri Has Extended the Federal Employers' Liability Act Beyond the Constitutional Powers of Congress to Regulate Interstate Commerce.

The first Federal Employers' Liability Act was passed by Congress in 1906, (34 Stat. at L. 232, Chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891). That act, although entitled differently from the present statute, was substantially the same in import as the present Act except that it was made applicable to all operations of a carrier engaged in interstate commerce, without a requirement that the carrier and its employee be engaged in interstate commerce at the time of injury to the employee. In the companion cases of *Howard* v. *Illinois Central Railroad Company* and *Brooks* v. *Southern Pacific Company*, 207 U. S. 463 52 L. Ed. 297, this Court was called upon to determine the constitutionality of that Act.

The Court held that the Act to be unconstitutional in that it exceeded the legislative powers delegated to Congress. The illegal feature of the Act rested in the fact that its language clearly demonstrated congressional intent to regulate all master and servant relationships of railroads and their employees even though the relationship might be confined to acts other than interstate commerce. In passing upon the question presented, this Court stated:

> "A few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad

engaged in interstate commerce, having a purely local branch operated wholly within a state. *Take again the same road having shops for repairs,* and it may be, for construction work, as well as a large accounting and clerical force * * *

"As the Act thus includes many subjects wholly beyond the power ~~the power~~ to regulate commerce, and depends for its sanction upon that authority, it results that the Act is repugnant to the Constitution * * *." (emphasis ours). *Howard* v. *Ill. Cent. R. Co.*, supra, l. c. 207 U. S. 498, 499, 52 L. Ed. 309.

In holding the first Act unconstitutional this Court recognized that repair shops were an illustration of an operation wholly independent of interstate commerce, and the intent and effect of the decision was to hold that Congress had no power to regulate master-servant relationships in such operations. Undoubtedly the repair shops of which the Court then spoke were and are those shops where cars and other instrumentalities have been removed from all commerce pending heavy or general repairs. In the case at bar we are concerned with such a repair shop relationship, and it must necessarily follow that if the present Act as amended is to be interpreted to include a subject previously held to be without the power of Congress to regulate, then the present Act as amended is unconstitutional. The Supreme Court of Missouri, in the case at bar, has interpreted the Amended Act to include that forbidden subject of Federal legislation. Its decision cannot be permitted to stand. The present act is constitutional and without the 1939 Amendment has been so held by this Court in the case of *Mondou* v. *New York, N. H. and H. R. Co.*, 223 U. S. 1; 56 L. Ed. 327. The Court then said:

"In view of these settled propositions, it does not admit of doubt that the answer to the first of the questions before stated must be that Congress, in the

> exertion of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employees, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged."

l.c. 223 U. S. 49; 56 L. Ed. 345.

In that case this Court recognized the limitations prescribed by the constitution and the fact that there must be a real or substantial connection with interstate commerce. In many cases such as the *Davis* case, the *Winters* case and others cited earlier herein, this Court has held that repair work on instrumentalities removed from commerce has no such real or substantial connection with interstate commerce, and the *Howard* case has listed repair shops as one of the operations which are wholly independent of interstate commerce and which cannot be regulated by Congress.

The interpretation of the 1939 Amendment which was adopted by the Missouri court is repugnant to the *Davis*, *Winters* and other cases; and particularly, the interpretation, under the law as declared by the *Howard* case, would render the Amendment unconstitutional. This petition for certiorari should therefore be granted in order that this Court may expunge the repugnant law declared by the Missouri Court.

Conclusion

Your petitioner urges that the Missouri Court has erred in its interpretation, and further urges that the question presented is of great import in the federal law; wherefore your petitioner respectively fully prays that the Court grant

this petition for certiorari to the Supreme Court of Missouri to the end that the decision of the Supreme Court of Missouri be reversed and that the existing conflict in decisions be resolved.

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APPENDIX

The Federal Employers' Liability Act

The pertinent provisions of the Federal Employers' Liability act (45 U. S. C. A., Sec. 51, et seq.) are as follows:

Sec. 51. LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE: DEFINITION OF EMPLOYEES

Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee: * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect, or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as entitled to the benefits of this chapter. Apr. 22, 1908, C. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 176

GULF, MOBILE & OHIO RAILROAD COMPANY,
a Corporation,

Appellant,

vs.

JAMES B. MAXIE,

Appellee.

APPELLEE'S REPLY TO PETITION FOR WRIT OF CERTIORARI STATEMENT, BRIEF AND ARGUMENT.

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APPELLEE'S REPLY TO PETITION FOR WRIT OF CERTIORARI STATEMENT, BRIEF AND ARGUMENT.

STATEMENT.

James B. Maxie was employed by the Gulf, Mobile & Ohio Railroad Company, as a general car repairman in the Frascati Yard at Mobile, Alabama. He did this work for many years for the Appellant. His duties on one occasion took him out of the State (T 13). On occasion he worked on cars in which there was merchandise (T 16). There is no dispute as to the facts of the accident nor as to the fact that at the time of the accident to Maxie he was working on a car which had been in interstate commerce immediately before and went out into interestate commerce immediately after the repairs. (See plaintiff's exhibit 19 opposite page 58 of transcript.)

ARGUMENT.

In the case of *Southern Pacific Company* v. *Industrial Accident Commission and Frank Mistretti*, 19 Cal. (2d) 271, the Court held that the amendment of 1939 broadened the scope of the application of the F E L A to include those not momentarily actively engaged in interstate movements within the purview of the act, and also that the statute was constitutional. This case was an appeal by a railroad employer against an award of the Industrial Commission in favor of an injured employee. The facts of the employment and the nature of the accident are practically on all fours with those in the case at bar. There the injured man was employed by the railroad as a car repairman and as such his duties required him to make repairs to the wooden portion of freight cars undergoing repair therein. The repairs performed were of both the running repair type, the light repair type and also of the heavy repair type. There the car remained in the shop for a period of 16 days from October 30, 1939 to November 16, 1939 on which latter date the car was returned to the place whence it would be put in use again in interstate commerce on November 17, 1939. From the date of its arrival at the shops to the date of the completion of repairs, the car remained on a track in the shops while the repairs were being performed. The superstructure of the car was stripped leaving only the trucks and steel body frame, and then the superstructure was rebuilt. (This is particularly identical with the facts in the case at bar.) On November 8, 1939, the injured party sustained his accident, a matter of 8 days before the car was sent out into the field again for its use, as compared with a matter

of one day in the case at bar. The railroad employer in that case argued to the court that it would be conceded that if that accident had happened prior to the 1939 amendment then the sole remedy of the injured man would have been under the State Workmen's Compensation Laws. The railroad employer then went on to argue that the amendments of 1939 to the F E L A are so worded as to cover that particular case.

The Court discussed the legislative history regarding the development of the question here involved and went to some length in quoting from the case of *Railroad Commission* v. *Chicago B & Q RR Co.*, 257 U.S. 563, 589 in which Mr. Chief Justice Taft, speaking for the Court, quoted at considerable length, from the Committee reports and explanatory statements of members in charge made in presenting the Bill for passage. We believe it sufficient to call it to this Court's attention a single sentence which appears at *page 278 of the Southern Pacific case* above,

> "Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce."

In the case at bar it can hardly be said with any seriousness, that the car upon which Maxie was working at the time of his injury was withdrawn from service to a degree more than temporary inasmuch as it came in from interstate service and went out immediately after repairs into interstate service. We believe it would be placing an undue burden upon this Court to define specifically just what length of time in any given case must elapse for that to be the sole determining factor as to whether or not the withdrawal of equipment from interstate service is tem-

porary or permanent. Certainly if it were permanent, it would be required to show that the car never went back into interstate commerce again. The facts here are quite the contrary and so we urge that this Court adopt the interpretation that at best the withdrawal of the car on which Maxie was working be considered as temporarily withdrawn from interstate commerce. We feel that it would do violence to reason to hold that working on a car that just came out of interstate service and then went directly into interstate service could be said to be anything other than directly, closely or substantially affecting Interstate or foreign commerce.

This same case decided that the Amendment of 1939 is not unconstitutional. The Court said at page 279:

> "The point is not well taken. If and when interstate business is clearly a part of the subject to be legislated on, the fact that interstate commerce may be interwoven therewith does not prevent the Congress from exercising its power. (*Baltimore & Ohio RR Co.* v. *Interstate Commerce Commission*, 221 U.S. 612, * * *; *Southern Railway Company* v. *U. S.*, 222 U.S. 20, * * *; *Texas and Pacific Ry. Co.* v. *Rigsby*, 241 U.S. 33, * * *; *National L R B D.* v. *Jones & Laughlin S. Corp.*, 301 U.S. 1, * * *."

The Court went on to say at page 280:

> " * * * One who is repairing such a car is clearly performing a duty which is ' . . . the furtherance of interstate or foreign commerce . . .' Moreover his work does '. . . directly or closely and substantially, affect such commerce.' "

Thus we see that the Court held as a matter of law, that the injured employee was engaged in interstate commerce and was acting within the purview of the 1939 Amendment of the F E L A. In the case at bar, it could hardly be argued with any seriousness that 12 reasonable minds

could differ as to the conclusion to be drawn from the fact that the car on which Maxie was injured was an interstate car and that the time of his injury being one consonant with a temporary withdrawal of the car from service it was a question of law to the effect that Maxie was in interstate commerce or in the furtherance of work closely and substantially related thereto.

In the case of *Ermin* v. *Pennsylvania RR Co.*, 36 Fed. Supp. 936, the Court discussed at considerable length the times over a period of several months that plaintiff was actually engaged in interstate commerce. In that case the facts were quite similar to the facts here at bar in that the cars on which plaintiff was working at the time of his injury were on their way to storage and repairs in the company's repair shop. The Court discussed the issue at some length and stated it to be whether or not the plaintiff at the time of his accident was employed in interstate commerce within the purview of the Federal Employers' Liability Act as amended by the Amendment of 1939. The Court said up to that time it was informed that there had been no reported decision construing the Amendment. The Court discussed the intendments of Congress with respect to this litigation quoting statements made by various Senators in relation thereto.

The Court very aptly said at page 940:

> "There are multitudinous decisions raising hair-splitting interpretations as to whether or not the employee at the time of his accident was actually engaged in interstate commerce. It was to avoid this difficulty that Congress enacted the Amendment. It was, undoubtedly, the intent of Congress to include within the scope of the Federal Employers' Liability Act all employees, even those performing intrastate services whose employment meets the requirement of the Act. *It is no longer subject to doubt that Congress*

had the power to include intrastate employment, which affects interstate commerce, within the scope of the Federal Employers' Liability Act. (Citing cases)" (Emphasis ours.)

The Court went on to say at page 941:

"From the facts stipulated and construing the Amendment literally, as it should be construed, the plaintiff at the time of the accident was engaged in interstate commerce. * * *"

In the case of *Albright* v. *The Pennsylvania RR Co.*, 183 Md. 421, the Court held that the tests as to whether one is engaged in interstate commerce is:

"Were his duties or any part thereof, at the time of injury, in furtherance of interstate commerce or did his duty affect in any way directly or closely and substantially, such commerce? If so, then the employment is in interstate commerce."

The facts of that case were that the plaintiff's decedent was a Chief Clerk at a Produce Terminal whose duties were to watch cars that had been delivered at the end of their transportation. Some of those cars were in intrastate commerce and some in interstate commerce. The Court held that the Amendment of 1939 should be literally construed to effectuate the intention of Congress. The Court also held that when evidence is introduced, tending to show that the employee at the time of injury was engaged in work any part of which was in furtherance of interstate transportation or in work any part of which affects such transportation in any way directly or closely and substantially then it is an interstate case. In the case at bar it could hardly be claimed that repairing cars, how be it heavy repairs made, which come in immediately from interstate shipments and go out immediately after repairs into interstate shipment are not affecting such transpor-

tation. If necessary repairs were not made to these cars they could not possibly be used in interstate shipments. In the *Albright* case the Court held as a matter of law that the evidence showed conclusively that the State Industrial Commission was without jurisdiction in the matter. The Court said in conclusion,

> "We hold, when on an appeal from an award of the State Industrial Accident Commission, the uncontradicted evidence, and all reasonable inference to be drawn therefrom, establishes the fact that the Commission was without jurisdiction to hear a claim, that a question of law is presented, and the trial judge should, upon application by the plaintiff, instruct the jury to reverse the findings of the Commission."

The foregoing quotation from the *Albright* case is nothing new and should need no authority to support it. In the case of *Patsaw* v. *Kansas City Southern Railway Company*, 56 Fed. Supp. 897, the facts briefly were that the injured man for more than a month prior to the accident was a member of a section crew working for the railroad repairing, replacing and keeping in good order tracks which were used interchangeably for interstate and intrastate commerce. At the time of the accident, this particular individual was driving a truck belonging to a contractor and used for the purpose of transporting members of the railroad's repair crews to and from various places in the course of their work. The Court cited with approval the cases of *Ermin* v. *Pennsylvania RR*, *Prader* v. *Pennsylvania RR* and *Edwards* v. *the B & O RR* as ample authority for the position which we take in the case at bar. The Court said at page 900:

> "While it is true, in the instant case, that the appellant was not engaged in interstate commerce at the time he was injured, yet a part of his duties as an employee of the appellee was the maintenance and re-

pair of tracks used for the transportation of interstate trains."

Can it be said that the repair of interstate cars is further removed from interstate commerce than the repair of tracks used for the same purpose?

In the case of *Shelton* v. *Thomson*, 148 Fed. (2d) 1, it was held that the 1939 Amendment made the Federal Employers' Liability Act applicable to any employee of the carrier whose duties shall in part be in furtherance of interstate commerce, and it had for its purpose the broadening of the scope of the Act to include employees whose work was related in functioning of interstate commerce though the employee himself was not engaged in such commerce. (Syllabus 1).

It was also held in that case that the plaintiff who was employed in the railroad storehouse operating a crane which hoisted carwheels into position for repair on freight trains, some of which were used in intrastate and others in interstate commerce, was engaged in furtherance of interstate commerce so as to come within the protection of Federal Employers' Liability Act; "furtherance" being a comprehensive term. This case was decided in 1945 by the Circuit Court of Appeals for the Seventh Circuit. The Court determined two issues in the case, one of which was the applicability of the Federal Employers' Act to the plaintiff's employment which was challenged. The facts of the case were briefly that the plaintiff was employed by the Chicago & North Western Railroad for 13 or 14 years and started to work on the crane in question when it was new in 1937. He left the job and came back to work on it again in March or April of 1942. The crane was provided with a winter and summer fan, which helped to blow the heat of the motor away from the cab in the summer

time and in the winter to blow it into the cab. Plaintiff got sick as a result, it was alleged, of being exposed to the condition of work in the cab of the crane.

The Court said at page 2 of the *Shelton* case the following:

> "Appellant contends that plaintiff does not come within the protection of the Federal Employers' Liability Act. This Act was amended in 1939 to read:
>
> 'Any employee of a carrier, any part of whose duties as such employee shall be the *furtherance of interstate or foreign commerce;* or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.' 45 U S C A section 51.
>
> "Prior to this Amendment the Act provided for the employers' liability to an employee for injuries suffered only when the employee was engaged in 'such commerce' which phrase referred to 'commerce between any of the several states'.
>
> "Appellant argues that plaintiff, employed in the railroad storehouse, operating a crane, which hoisted carwheels into position for repair on freight trains, some of which were used in intra and others in interstate commerce, was not one who could conceivably be said to be engaged in interstate commerce.
>
> "*However, we have before us, for construction, the amended act, not the original section. There can be no doubt but that the Amendment was intended to broaden the scope of the Act to include employees whose work was related to the functioning of interstate commerce.* Concededly the relationship between the encompassed occupation and the actual transportation in interstate commerce has become more tenuous as this law has developed. It was this fact, no doubt, that caused Congress to enlarge the scope of the Act by

stating that all employment in '*furtherance* of interstate * * *,' are within the Act. The word 'furtherance' is a comprehensive term.

"It's periphery may be vague, but admittedly it is both large and elastic. *It would not be an undue stretching of it to hold that one who is engaged with others in the process of repairing the cars so that it may thereafter be moved in interstate (or by happenstance in intrastate), is engaged in an occupation 'in furtherance' of interstate commerce.* (Emphasis ours).

"A car cannot travel even in interstate commerce, without wheels. Ordinarily a car is as usual in interstate as in intrastate commerce. The same crane which plaintiff operated, moved many articles. Some were used on cars which moved in interstate commerce. No one in the employ knew where the carwheel would be used. Perhaps the success of the repair efforts would determine its future use."

Could railroads engage in any commerce without cars!

We feel that Mr. Justice Evans, who delivered the opinion of the Court, pleaded our case eloquently and we adopt his language. With this Court's indulgence we shall quote further from the same case following the above quotation.

"The report of the Senatorial Committee indicates that the Amendment was intended to extend the application of the Federal Employers' Liability Act to employees, like plaintiff, who are engaged in work which left them and their attorney in deepest doubt as to the law which governs their employers' liability and their right to recover damages for injuries which they might receive. The Amendment was, we believe, a much needed one—and the selection of the phrase, '*furtherance* of interstate * * * commerce' to accomplish the purpose of clarification, an effective and purposeful one."

What chaos would ensue to hold differently at this late date.

Thus by analogy if a crane used to put wheels on cars would bring an employee within the purview of the Amendment, certainly the individual who was more closely related to the repairs of the car than the crane operator by virtue of his repairing the cars themselves should most certainly be considered to be also within the purview of the Amendment.

In the case of *Edwards* v. *Baltimore & Ohio Railroad*, decided by the Circuit Court of Appeals for the Seventh Circuit, reported in *131 Fed. (2d) 366*, in 1942 the Court said at page 369:

> "Despite any question as to whether plaintiff might have recovered under the original act (See *New York Central Ry.* v. *Marcone, 281 U.S. 345, 50 S C C 294, 74 L E D. 892*), it is clear that he is within the scope of the Amendment. Under the original statute experience demonstrated continued difficulty in ascertaining when the work of an employee was part of interstate commerce. The Amendment, much wider in scope, was inspired by a desire to avoid such confusion. Congress' intent to include any employee who performed services which in any way further or affect interstate commerce is clear. *Ermin* v. *Pennsylvania Ry., D C N Y, 36 F. Supp. 936; Southern Pacific Co.* v. *Industrial Accident Commission, C A L App. 113, B 2d 768, 770 affirmed by California Supreme Court in 19 CAL. 2d 883, 120 D 2d 888; Piggue* v. *Baldwin, 154 Kan. 708, 121 B. 2d 183; Louisville & N. C. Potts, Tenn. Sup. 158 S. W. 2d 729.* Inasmuch as this locomotive was used in interstate commerce and was destined to resume such service as soon as repaired, plaintiff, engaged in repairing it and fitting it for further commerce, thereby furthered and substantially affected interstate commerce within the meaning of the law."

So also did plaintiff in the case at bar, by doing his repair work on these cars, repairing the same, especially the one mentioned in the case, for further interstate commerce,

thereby furthered and substantially affected interstate commerce within the meaning of the law.

In the case of *Great Northern Railway Company* v. *Industrial Commission, 245 Wisc. 375* the same question of the applicability of the Federal Employers' Liability Act, as amended to certain types of employment was decided. In that case we believe the facts were much more remotely connected with the Amendment than the case at bar. In the *Great Northern* case the facts briefly were that certain ore docks located at Superior, Wisconsin were closed between the period of December 5, 1941 to April 4, 1942. It was customary for repairs to the docks to be made during the period that the docks were closed down and not operated for the interstate commerce which it ordinarily was used for, to-wit: that of handling cars with ore in interstate shipments. On December 24, 1941 the injured man, Chris Hammer, was injured fatally while engaged in work connected with the general repairs of the ore docks. When injured, Hammer was acting as a signal man on a locomotive crane. This crane was equipped with a derrick boom and was engaged in loading timbers from a pile on the ground to flatcars about 35 feet from the ground on a trestle approach to one of the ore docks. While he was so employed, the locomotive crane on which he was standing was struck by another locomotive crane causing him to be thrown to the ground about 35 feet and killed. The Court went into an exhaustive discussion of the cases which have been called to the attention of this Court *supra* and distinguished the withdrawal of equipment for considerable periods of time which would have taken the equipment out of the purview of the Federal Employers' Liability Act prior to the Amendment from the interpretation to be given the same following the Amendment of 1939. It's discussion on that point appears

on page 383 of the opinion. The Court in the *Great Northern* case quoted from the case of *Oregon Short Line R. Co. v. Gubler, 9 Fed. (2d) 495.* From the quotation it becomes apparent that even before the 1939 Amendment that Court held that repairs made that were in connection with the furtherance of commerce was work that constituted interstate commerce as distinguished from purely new construction. The Court went on to say that Hammer was engaged in interstate commerce when injured.

In the case of *Wright* v. *New York Central RR, 288 N.Y. 719,* the Court held that a boilermaker working on a locomotive engine which had been withdrawn from interstate transportation from which the fire had been drawn and the water drained, and which was unable to function and had no assignment, was nevertheless working under the Federal Employers' Liability Act as amended in 1939. This was decided on June 18, 1942.

In the case of *Agostino* v. *Pennsylvania RR Co., 50 Fed. Supp. 726,* an exhaustive list of cases had been submitted to the Court by counsel, touching upon the question before this Court, many of which have been cited and quoted from in this Brief. The Court there said at page 729:

> "The weight of authority is to the effect that the Amendment should be liberally construed so as to extend the protection of this Act to all employees, any part of whose duties furthers or affects interstate commerce 'in any way'."

The facts in that case were also remote in point of time from the actual use of the instrumentality involved in interstate commerce. The plaintiff in the *Agostino* case was injured a month before actual transportation of revenue freight in both interstate and intrastate commerce on the track involved was begun. The Court in its conclusions said at page 730:

"The conclusion seems inescapable that the construction work, while new, was only an improvement such as an extension, alteration, replacement or repair and, therefore, the plaintiff was engaged in interstate commerce."

In the case of *Prader* v. *Pennsylvania RR, 49 NE 2d, 387* the plaintiff was interrupted in his work by his foreman who instructed him to go to a village some 6 miles away for the purpose of procuring a rule book through which he would familiarize himself with his duties of a flagman. The question in that case was twofold, to-wit: (1) was he entitled to the benefits of the Federal Employers' Liability Act as amended by being within interstate commerce; and (2), was the 1939 Amendment constitutional. The Court held in that case in the affirmative on both questions. The Court cited all of the cases cited by the plaintiff in the case at bar.

The most recent decision bearing on this question is the case of *Baird et al* v. *New York Central RR Co., et al, in 299 N.Y. 213, 86 NE (2d) 567* and decided on May 26, 1949, appearing in the advance sheets. That case held that where craftsmen were employed at all times in the back shop of an interstate railroad within a State and the work affected dead locomotives used in interstate transportation, but withdrawn from active service and within shop, the work was performed in furtherance of interstate commerce so as to preclude Workmen's Compensation awards and bring the craftsmen within the purview of the Federal Employers' Liability Act as amended in 1939. The Court in that case said, that reading the language apart from the legislative and judicial history it would have to say that the activities of each of the workers whose claims were involved did further interstate commerce and certainly affected it closely and substantially since it is undisputed

that the every day operation of the railroad required that those car repair shops be busy repairing the railroad's locomotives. Certainly by analogy it must be said that repairing freight cars that come in and out of the shop from and to interstate transit were such as to compel the conclusion that work done upon it would be in furtherance of and closely affecting interstate commerce. The Court said that the "pin point rule" was completely wiped out. It cited the case of *Wright* v. *New York Central Railroad*, *288 N.Y. 719* in which a petition for Writ of Certiorari was denied by this Court, (see *317 U.S. 668*). The Court in the *Baird* case discussed the Committee of Congress' Report and quoted from it as follows:

> "The adoption of the proposed Amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death was actually engaged in the movement of interstate traffic. *If any part of the employee's duty (at the time of his injury or death) directly, closely or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the Act.*" (Emphasis ours.)

The Court went on to say that Congress intended not only to abolish the pinpoint rule but also to broaden the whole concept of interstate transportation as covered by the Federal Employers' Liability Act using sweeping language in doing so. The Court went on to say that the clear trend of decisions on this matter in the Federal Court of Appeals and State Courts of last resort are in conformity with the decision in that case, citing the *Shelton*, *The Great Northern* cases cited above and also the *Maxie* case which is the case before this Court.

We call to this Court's attention the fact that of all the cases cited and quoted from by appellant in the instant case not one was decided subsequent to the Amendment of 1939.

CONCLUSION.

We respectfully submit that appellant has failed to demonstrate that the Supreme Court of Missouri erred in any of the 6 specifications of error urged by Appellant. In view of the fact that the pinpoint rule has been abolished and wiped out by the Amendment and in the light of all decisions that a car only temporarily withdrawn from movement does not lose its interstate character by that alone, it would place an extreme burden upon litigants and Courts to reassert the pinpoint rule by saying that only short temporary withdrawals would not affect the interstate character of the employee's work, as distinguished from temporary withdrawals of a slightly more lasting nature. Where would the line be drawn? Would the point of demarcation be limited to hours or days or fractions thereof?

We cannot take appellant's contention of the unconstitutionality of the statute seriously at all.

We, therefore, ask that the petition for Certiorari be denied.

Respectfully submitted,

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